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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1354

THE BUSINESS ROUNDTABLE, *Petitioner,*

v.

CONSUMERS UNION OF UNITED STATES, INC., ET AL.,

and

COST OF LIVING COUNCIL, ET AL., *Respondents.*

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA, AS AMICUS CURIAE, IN SUPPORT OF THE PETITION OF THE BUSINESS ROUND TABLE FOR WRIT OF CERTIORARI

NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA

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INDEX

	Page
Interest of the *Amicus Curiae*	2
Argument:	
1. The present case involves a significant interpretation of the Economic Stabilization Act	2
2. The lower court erred in requiring that its interpretation of the Act under Phase III be carried over and applied to Phase IV	3
Conclusion	6

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With consent of the parties, the National Association of Manufacturers of the United States of America respectfully submits this brief as *amicus curiae* in support of the petitioner.

INTEREST OF THE AMICUS CURIAE

The National Association of Manufacturers (NAM) is a non-profit voluntary business association, organized as a membership corporation under the laws of the State of New York. It is composed of manufacturing and related concerns of all sizes located throughout the United States and represents a substantial portion of the nation's industrial employment.

This case involves an issue of first impression concerning the disclosure required of certain firms under the Economic Stabilization Act. The decision of the Temporary Emergency Court of Appeals, if left standing, will place firms subject to the regulations at a serious competitive disadvantage vis-à-vis domestic and foreign firms which are not subject to the regulations. Many of these disadvantaged firms are members of the NAM.

Accordingly, the NAM has proper interest in the resolution of the issues before the Court in this case.

ARGUMENT

1. The Present Case Involves a Significant Interpretation of the Economic Stabilization Act.

Although the present Economic Stabilization Act will expire April 30, 1974 and no one knows what, if any, legislation will be enacted to replace or continue the present Act, the issue presented by this case will not be mooted in any event. The decision of the lower court requires public disclosure by product line of information submitted to the Cost of Living Council in quarterly reports. Since this disclosure applies only to firms with annual sales or revenues of $250,000,000 or more, the application of the disclosure provisions

is discriminatory. It will give both foreign and domestic competitors pertinent sales trends and other information covering at least a one year period, which would interfere with the competitive position of the firms subject to the disclosure requirement.

The broad decision of the lower court applied the disclosure requirements to Phase IV as well as Phase III. Information could be disclosed even though the firm was in compliance with Phase IV regulations, if a price increase violated the now obsolete Phase III criteria. For these reasons the decision in this case will adversely affect the present competitive position of firms subject to disclosure regardless of any change in the law.

While the NAM disagrees with the interpretation of Section 205 as it applies to Phase III, if that interpretation were not applied to Phase IV, it would not have sufficient adverse impact to warrant this Petition.

2. The Lower Court Erred in Requiring that Its Interpretation of the Act Under Phase III Be Carried Over and Applied to Phase IV.

There is no reasonable basis to carry over the interpretation of Section 205 from Phase III to Phase IV. The purpose of the disclosure amendment, sometimes called the Hathaway Amendment, was to publicize certain statistics of firms which raised prices in excess of the Phase III criteria. Its purpose was to utilize public opinion to encourage compliance with the standard. This is demonstrated by Senator Hathaway's statement:

> "My amendment, without interfering with the looser and self-administered aspects of Phase III, just gives these companies the impetus to keep

price increases in line with Phase III guidelines . . . ." (119 Daily Cong. Rec. S 5119)

If this reasoning had any merit during Phase III, it disappeared in Phase IV. This is because Phase III was administered through "voluntary" and "self-administering" methods. (See Senate Committee on Banking, Housing, and Urban Affairs, Report No. 93-63). New sanctions were added for Phase IV. Now the Cost of Living Council regulations provide for criminal fines and civil penalties. Injunctive and other relief are also provided in Sections 140.41 and 140.42.

In Phase III a company could increase prices to reflect increased costs so long as there was no increase in its profit margin. Alternatively prices could be increased by a weighted annual average of 1.5 percent without regard to the profit margin limitation. Phase IV is quite different. Price increases are permitted only to reflect a dollar for dollar pass through of additional costs. In addition, the Cost of Living Council must approve exceptions; in Phase III there was a self-executing exceptions procedure.

The lower court made the disclosure provisions applicable to Phase IV because Section 205 was carried over to Phase IV without change. The substantially changed circumstances would not necessitate the carrying over of Phase III disclosure regulations to Phase IV. The retaining of the limited disclosure regulations was a discretionary act of the agency. This is also demonstrated by the Cost of Living Council's preamble to its Phase IV regulations which stated, "The record is simply not conclusive either way in resolving the central issue of whether or not Section 205 (b), which incorporates a Phase III regulation, survived

Phase III and has continued applicability in Phase IV. The choice must therefore be made between the competing policy alternatives. . . ."

In *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402 (1971), this Court reviewed an action by the Secretary of Transportation authorizing the use of federal funds to finance the construction of a highway through a public park. The Court said that in reviewing the action under the Administrative Procedure Act, 5 U.S.C. § 706 (2) (A), the Court was required to make a finding that the Secretary's choice of the location for the highway was not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law". To make that decision a court must consider whether the decision was based on relevant factors. "Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is narrow one. The court is not empowered to substitute its judgment for that of the agency." (p. 416)

The criteria of the Administrative Procedure Act was expressly made applicable to the Economic Stabilization Act in Section 211 (d) (1). Thus the same criteria should be applied in the present case that was applied in *Citizens* v. *Volpe.* It is submitted that the lower court erroneously substituted its judgment for that of the agency when it determined that its expanded disclosure provisions of Phase III *must* be applied to Phase IV. The different nature of the Phase IV regulations means that the agency has discretion to determine appropriate disclosure regulations. Therefore, the lower court exceeded its authority when it applied its decision to Phase IV.

CONCLUSION

It is submitted that this court should grant the Petition for a Writ of Certiorari because this case involves a significant interpretation of the Economic Stabilization Act giving some firms an unfair competitive advantage, and the court below in its decision erroneously substitutes its judgment for that of the agency in extending Phase III regulations to Phase IV.

Respectfully submitted,

NATIONAL ASSOCIATION OF MANUFACTURERS
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